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11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**

14 **JONATHAN HOANG TO**, individually
and on behalf of all others similarly
15 situated,

16
17 Plaintiff,

18 v.

19 **DIRECTTOU, LLC**, a Delaware
20 Limited Liability Company

21 Defendant.
22
23
24
25
26
27
28

Case No 3:24-CV-06447-WHO

**DEFENDANT'S RESPONSE IN
OPPOSITION TO MOTION TO
INTERVENE AND TO DISMISS,
OR ALTERNATIVELY TO
TRANSFER OR STAY**

L.R. 6-2

Current Hearing Date:
12/18/24

New Hearing Date:
12/04/24

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INTRODUCTION

Proposed Intervenor fail to satisfy the requirements for intervention as of right, and permissive intervention should be denied. They have no protectable interest in participating in *preliminary* approval proceedings that will not determine their rights. Specifically, to the extent they have an interest in the terms of the settlement, they will be able to protect it through the ordinary process of opt-outs and objections afforded all putative settlement class members under Rule 23 and the settlement agreement itself. If Proposed Intervenor find the terms undesirable, they are free to opt-out of the settlement. And, if Proposed Intervenor wish to participate, but find the terms unreasonable, they are free to file their objections to the settlement – just like any other putative settlement class member.

Moreover, Proposed Intervenor have failed to overcome the presumption that Plaintiff and Plaintiff’s counsel in this action are adequate representatives. As explained in Plaintiff’s Motion for Preliminary Approval, the terms of the settlement are well within the range of court-approved Video Privacy Protection Act (“VPPA”) class settlements. Tellingly, Proposed Intervenor sought to intervene and oppose the settlement as purportedly unfair before the terms of the Settlement even became public and have not explained why the terms of the settlement are not fair and reasonable. Accordingly, it is apparent that the proposed intervention is not about protecting interests of any putative settlement class, but rather, about protecting Proposed Intervenor’s individual interests – which they will have the right to exercise when deciding whether to opt-out or file an objection to the settlement.

Proposed Intervenor represent only themselves at this juncture and are putative settlement class members. They can raise their objections to the settlement, if any, in the ordinary course provided under Rule 23 and as set forth in the class settlement agreement. Or, if they prefer, they can opt-out of the settlement altogether and resume prosecution of their individual claims. Proposed Intervenor’s untimely and unnecessary motion to intervene should be denied.

BACKGROUND

On August 12, 2024, Plaintiff Jonathan Hoang To (“Plaintiff”) filed this action in the Superior Court of California, County of Alameda, asserting a violation of the VPPA, as well as violations of California’s state analog to the VPPA, Cal. Civ. Code § 1799.3 and California’s Business & Professional Code § 17200 et seq.

On September 12, 2024, Defendant removed this action to the Northern District of California. On September 18, 2024, Defendant informed the Court of the pendency of *Feller et al. v. Alliance Entertainment, LLC*, et al., Case No. 0:24-CV-61444-RAR (S.D. Florida) as the basis for seeking an extension of time to respond to the complaint, which was granted. ECF 8-9.

On October 23, 2024, the parties executed a class action settlement agreement and informed Proposed Intervenorors that a settlement had been reached on October 24, 2024.

On October 28, 2024, Proposed Intervenorors Douglas Feller, Jeffry Heise, and Joseph Mull, who are plaintiffs in *Feller et al. v. Alliance Entertainment, LLC*, et al., Case No. 0:24-CV-61444-RAR (S.D. Florida) (“Proposed Intervenorors”), filed a Motion to Intervene and to Dismiss or alternatively, Transfer this case to the Southern District of Florida or Stay (“Motion to Intervene”). ECF 14. To date, no class has been certified in the *Feller* Action nor have Proposed Intervenorors moved for class certification.

On November 4, 2024, Plaintiff filed his unopposed Motion for Preliminary Approval of the class action settlement in this action. ECF 26.

LEGAL STANDARD

Intervention by members of a putative class is subject to the ordinary requirements of Federal Rule of Civil Procedure 24. *See* Fed. R. Civ. P. 24(a)(2). The party seeking intervention bears the burden of demonstrating that Rule 24 is satisfied. *U.S. v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). Unless a would-be party satisfies Rule 24(a)’s requirements for intervention as of right, the

1 decision to allow intervention under Rule 24(b) is almost purely discretionary.
 2 *Orange Cnty. v. Air Cal.*, 799 F.2d 535, 539 (9th Cir. 1986).

3 The Ninth Circuit has adopted a four-part test for intervention as of right under
 4 Rule 24(a)(2). *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). “A party
 5 seeking to intervene as of right must meet four requirements: (1) the applicant must
 6 timely move to intervene; (2) the applicant must have a significantly protectable
 7 interest relating to the property or transaction that is the subject of the action; (3) the
 8 applicant must be situated such that the disposition of the action may impair or
 9 impede the party's ability to protect that interest; and (4) the applicant's interest must
 10 not be adequately represented by existing parties.” *Id.* Each element is mandatory,
 11 and failure to establish any one is grounds to deny intervention. *See Smith v. Marsh*,
 12 194 F.3d 1045, 1049-50 (9th Cir. 1999). Permissive intervention under Rule 24(b)
 13 likewise requires a timely motion. *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th
 14 Cir. 1998). More fundamentally, however, decisions on permissive intervention are
 15 always discretionary. *Orange Cnty.*, 799 F.2d at 539. In exercising that discretion,
 16 the Court must consider whether intervention will cause undue delay for the original
 17 parties. Fed. R. Civ. P. 24(b)(3).

18 ARGUMENT

19 I. Proposed Intervenors Do Not Satisfy The Requirements For Intervention 20 As of Right

21 A. Proposed Intervenors’ Motion Is Untimely.

22 The Motion to Intervene is not timely. The court determines timeliness by
 23 evaluating three factors: “(1) the stage of the proceeding at which an applicant seeks
 24 to intervene; (2) the prejudice to other parties; and (3) the reason for and length of
 25 the delay.” *Zepeda v. PayPal, Inc.*, No. 10CV02500SBAJCS, 2014 WL 1653246,
 26 at *3 (N.D. Cal. Apr. 23, 2014), *objections overruled*, No. C 10-1668 SBA, 2014
 27 WL 4354386 (N.D. Cal. Sept. 2, 2014).

Proposed Intervenor were aware or should have been aware of this action when it was filed and did not take any action to intervene until the action had been pending for months and after the action had settled. In early September, Defendant’s counsel conferred with Proposed Intervenor’s counsel and suggested scheduling a global mediation to resolve this pending action along with the *Feller* Action. **Ex. A**, Decl. of Bonnie DelGobbo ¶¶ 4, 6. Proposed Intervenor rejected that proposal (*id.* ¶ 6) and did not take any action at that time to intervene in this case. Accordingly, Proposed Intervenor mediated the *Feller* Action while fully aware that this parallel action was still proceeding in their absence. In short, Proposed Intervenor sat on whatever rights they might otherwise have had to intervene until after the action settled and, by so doing, rendered their belated motion untimely.¹

This situation is similar to *Lane v. Facebook, Inc.*, No. C 08-3845 RS, 2009 WL 3458198, at *3 (N.D. Cal. Oct. 23, 2009). In *Lane*, the parties reached a class settlement in a putative VPPA class action for which they were seeking preliminary approval when the named plaintiffs in another out-of-district putative VPPA class action filed a motion to intervene only after the settlement had been reached – which was untimely. As the court explained, “[w]hatever rights or interests Proposed Intervenor may have had in enforcing a first-filed rule, those rights and interests (if any) necessarily arose the moment this action was filed, and were known or should have been known to Proposed Intervenor when they learned of the very *existence* of this lawsuit.” *Lane v. Facebook, Inc.*, No. C 08-3845 RS, 2009 WL 3458198, at *3 (N.D. Cal. Oct. 23, 2009)(emphasis in original).

¹ The declaration submitted by Proposed Intervenor’s counsel asserts that he began investigating alleged VPPA claims against Defendant in 2019—five years before Proposed Intervenor filed their case. If that assertion is true, it underscores the issue of untimeliness because challenged practices were allowed to continue for five years without alerting Defendant to any allegation of unlawfulness. Moreover, the statute of limitations on VPPA claims is two years.

1 In addition to the passage of time, the stage of the proceedings renders the
 2 Motion to Intervene untimely. Indeed, the Ninth Circuit has explained that, “a
 3 party’s seeking to intervene merely to attack or thwart a remedy rather than
 4 participate in the future administration of the remedy is disfavored.” *Alisal Water*
 5 *Corp.*, 370 F.3d at 922 (affirming denial of motion to intervene by judgment creditor
 6 where creditor sought to intervene to contest a possible award of damages to the
 7 plaintiff in the action). Here, Proposed Intervenor – who represent only themselves
 8 at this juncture – seek to intervene to effectively contest the class settlement
 9 agreement, thereby prejudicing the putative settlement class by delaying their receipt
 10 of notice of the settlement and substantial relief provided them under the settlement.

11 Because Proposed Intervenor have not shown that the Motion to Intervene is
 12 timely, this necessary element has not been satisfied and the Motion to Intervene
 13 should be denied.

14 **B. Proposed Intervenor Need Not Intervene to Protect Their Interest in** 15 **a Fair Settlement**

16 Proposed Intervenor have not identified any “significantly protectable
 17 interest” that would be impaired if they cannot participate at the preliminary
 18 approval stage. To intervene as of right, Proposed Intervenor must identify both a
 19 “significantly protectable interest,” and articulate why intervention is necessary to
 20 protect it. *See Arakaki*, 324 F.3d at 1083. In their Motion, Proposed Intervenor
 21 appear to assert an interest in the ultimate outcome of this litigation, but fail to show
 22 that protecting it requires an opportunity to separately oppose preliminary approval
 23 of the class action settlement.

24 First, Proposed Intervenor do not identify a protectable interest to justify their
 25 intervention at this juncture. Indeed, there is no “significantly protectable interest
 26 incumbent in an opportunity to object to preliminary approval,” because “the Court
 27 will make its determination as to whether *final* approval should be granted based on
 28 the facts and law before it at that point in time . . . and [will] not be influenced by

1 previously granted *preliminary* approval.” *Lane*, 2009 WL 3458198, at *5 (emphasis
 2 added); *see also Davis v. J.P. Morgan Chase & Co.*, 775 F. Supp. 2d 601, 607
 3 (W.D.N.Y. 2011) (noting that preliminary approval, “in contrast to final approval,
 4 ‘is at most a determination that there is what might be termed ‘probable cause’” to
 5 give class members’ notice and hold a “full-scale” fairness hearing). It is no
 6 coincidence that there is “no Civil Local Rule, Federal Rule of Civil Procedure, or
 7 other authority that permits a putative class member to file objections to a motion
 8 for preliminary approval.” *Chavez v. PVH Corp.*, No. 13-cv-01797-LHK, 2015 WL
 9 12915109, at *3 (N.D. Cal. Aug. 6, 2015).

10 Indeed, “[t]he Ninth Circuit recognizes in the class action settlement context,
 11 a putative intervenor's concerns may ‘largely be addressed through the normal
 12 objection process.’” *Raquedan v. Centerplate of Delaware Inc.*, 376 F. Supp. 3d
 13 1038, 1041–42 (N.D. Cal. 2019)(citing *Allen v. Bedolla*, 787 F.3d 1218, 1222 (9th
 14 Cir. 2015); *see also Devlin v. Scardelletti*, 536 U.S. 1, 14, 122 S.Ct. 2005, 153
 15 L.Ed.2d 27 (2002) (explaining that “class action procedure allows nonnamed class
 16 members to object to a settlement at the fairness hearing without first intervening”).);
 17 *see also Perkins v. Ryder Integrated Logistics, Inc.*, No. 23-CV-00502-WHO, 2023
 18 WL 8481817, at *2 (N.D. Cal. Dec. 7, 2023)(denying intervention and explaining
 19 that The central themes of these cases is that intervention is not appropriate where
 20 the ability of the proposed intervenor can be protected by the options to opt-out of
 21 or object to the proposed settlement. These are adequate mechanisms for *Nance* to
 22 challenge the fairness and adequacy of any proposed settlement and protect her own
 23 interests here. *Zepeda v. PayPal, Inc.*, 2014 WL 1653246, at *4, 8 (N.D. Cal. Apr.
 24 23, 2014) (“Allowing the Putative Interveners to opt out or object to the settlement
 25 in the fairness hearings would be far less disruptive than allowing them to intervene,
 26 and it would still preserve their interests.”); *Harvey v. Morgan Stanley Smith Barney*
 27 *LLC*, No. 18-CV-02835-WHO, 2019 WL 9441672, at *3 (N.D. Cal. Sept. 5, 2019)(J.
 28 Orrick)(denying motion to intervene by putative class member, explaining that

1 “Intervention is also unnecessary to protect the interest of the Proposed Intervenor.
 2 Lucadano is a class member. He may object or opt out.”), *aff’d*, No. 19-16955, 2022
 3 WL 3359174 (9th Cir. Aug. 15, 2022).

4 Here, the settlement agreement expressly provides the Proposed Intervenor
 5 with opt-out rights, and the Proposed Intervenor also have the ability to object to
 6 the settlement. ECF 26-2 at ¶¶4.2 – 4.5. Accordingly, Proposed Intervenor’s alleged
 7 interests are sufficiently protected. *See, e.g., Bergman v. Thelen LLP*, No. C-08-
 8 05322 EDL, 2009 WL 1308019, at *2 (N.D. Cal. May 11, 2009) (“The disposition
 9 of the action will not, as a practical matter, impede or impair applicants’ ability to
 10 protect their interest[,]” and they “may opt of the class action and assert any claims
 11 they wish to pursue against Defendants.”); *Cohorst v. BRE Properties, Inc.*, No. 10-
 12 cv-2666 JM (BGS), 2011 WL 3475274, at *6 (S.D. Cal. Aug. 5, 2011)(denying
 13 intervention motion where proposed intervenor “may raise any objections to the
 14 settlement at the time of the Final Hearing[.]”).

15 **C. Existing Parties Adequately Protect Proposed Intervenor’s Interests**

16 Proposed Intervenor fail to show that their protectable interest is not
 17 adequately represented by the existing parties. A “presumption of adequacy of
 18 representation arises” when the “applicant for intervention and an existing party
 19 have the same ultimate objective.” *Arakaki*, 324 F.3d at 1086. Proposed Intervenor
 20 and named Plaintiffs have the same objective: obtaining relief for the purported
 21 harms they allegedly experienced as a result of Defendant’s alleged disclosure of PII
 22 under the VPPA. *Compare* ECF 23 (Second Am. Compl.) *with* ECF 14 (*Feller*
 23 *Action Compl.*). Specifically, Plaintiff has brought this action on behalf of the
 24 following putative nationwide class and California sub-class:

25 **Nationwide Class**

26 All natural persons residing in the United States who
 27 purchased a video or videogame from Defendant or signed
 28

up to receive notices about videos or videogames from Defendant, and about whom information which identified such persons as having requested or obtained specific video materials or services from Defendant may have been disclosed to a third party, including, but not limited to, Meta.

California Sub-Class

All natural persons residing in California who purchased a video or videogame from Defendant or signed up to receive notices about videos or videogames from Defendant, and about whom information which identified such persons as having requested or obtained specific video materials or services from Defendant may have been disclosed to a third party, including, but not limited to, Meta.

ECF 23 at ¶¶69-70.

The putative classes in this action encompass the putative class alleged in the *Feller* Action:

(a) The Data Brokerage Class: All persons in the United States who, during the two years preceding the filing of this action, purchased prerecorded video material from Defendants and had their Private Viewing Information disclosed to a third-party by Defendant.

(b) The Meta Pixel Class: All persons in the United States who, during the two years preceding the filing of this action purchased prerecorded video material from Defendants' website while maintaining an account with Meta Platforms, Inc. f/k/a Facebook, Inc.

ECF 14 at ¶85.

First, there is a presumption of adequate representation when “the persons attempting to intervene are members of a class already involved in the litigation or are intervening only to protect the interests of class members.” *Bergman*, 2009 WL 1308019, at *2 (internal quotation omitted). This presumption can only be rebutted with a “compelling showing” to the contrary. *Arakaki*, 324 F.3d at 1086. Proposed Intervenor has made no such showing, because they offer no “evidence of collusion, nonfeasance, adversity of interest, incompetence, or lack of financial resources.” *In re Cloudera, Inc. Secs. Litig.*, No. 5:19-CV-03221-LHK, 2021 WL 1238301, at *2-3 (N.D. Cal. Apr. 2, 2021) (internal quotation omitted).

Courts in this District have denied intervention where putative class members in parallel pending cases seek to intervene and oppose preliminary approval of a class settlement by launching baseless accusations of “collusion.” *See, e.g., Kang v. Wells Fargo Bank, N.A.*, No. 17-CV-06220-BLF, 2021 WL 4170735, at *4 (N.D. Cal. Sept. 14, 2021), *aff’d sub nom. Kang v. Fyson*, No. 22-15694, 2022 WL 6943174 (9th Cir. Oct. 12, 2022) (denying intervention despite contention that “intervention is required to permit him to raise and explore the impact of a supposedly secret side deal,” as proposed intervenor did not adequately explain why intervention was not sought earlier nor “why the [] issue cannot be addressed through ‘the normal objection process.’ ”); *Perkins v. Ryder Integrated Logistics, Inc.*, No. 23-CV-00502-WHO, 2023 WL 8481817, at *1 (N.D. Cal. Dec. 7, 2023). Contrary to Proposed Intervenor’s imagined “collusion” between the parties, the reality is that the plaintiff in the *Hoang To* Action made the opening settlement demand without any input or suggestion of valuation from Defendants, at no time during the negotiation of settlement valuation did Defendants tell the *Hoang To* plaintiff’s firm that Defendants had engaged in any settlement discussions in the *Feller* case, and at no time during these settlement negotiations did Defendants tell the *Hoang To* plaintiff’s firm any settlement figures that Defendants had exchanged

1 with the *Feller* plaintiffs’ firm. DelGobbo Decl. at ¶¶8-10. Defendants conducted
 2 settlement negotiations with the *Hoang To* Plaintiff at arms-length and they were
 3 able to reach a resolution after exchanging multiple monetary and non-monetary
 4 positions. *Id.* at ¶¶8-9. Just because Plaintiffs in the *Feller* action were unable to
 5 reach their own settlement agreement with Defendants does not give rise to an
 6 inference that anyone else capable of negotiating a settlement must have “colluded.”²

7 Moreover, Proposed Intervenor’s falsely imply that there had been “significant
 8 discovery” in the *Feller* action prior to culmination of the settlement agreement in
 9 *Hoang To* on October 23, 2024. (ECF No. 14 at 23.) However, the reality is that the
 10 parties had agreed to stay discovery pending the mediation, and no discovery
 11 responses were due from either side until after settlement had been reached. **Ex. B**,
 12 10/10/2024 Email from A. Ravindran. Moreover, no response to the Complaint in
 13 either case had yet been filed.

14 _____
 15 ² Proposed Intervenor’s reliance on *Rahman v. Gate Gourmet, Inc.*, No. 3:20-CV-
 16 03047-WHO, 2021 WL 5973046, at *5 (N.D. Cal. Nov. 22, 2021) is misplaced.
 17 First, *Rahman* did not grant a motion to intervene. Rather, the Court merely lifted a
 18 stay previously agreed upon between the parties to allow the California state court
 19 an opportunity to assess the plaintiff’s efforts to intervene and challenge to a class
 20 settlement pending in state court. After the state court judge directed the parties to
 21 seek this Court’s guidance as to whether the case should proceed, this Court granted
 22 the plaintiff’s motion to lift the stay. The Court noted, however, that the state court
 23 judge – before whom the motion for preliminary approval of the class settlement
 24 was pending – was “better positioned than I to assess the concerns about collusion
 25 that I have raised.” Here, Judge Ruiz in the *Feller* Action has administratively closed
 26 that matter so this Court may decide the motions to intervene and motion for
 27 preliminary approval pending before it. Unlike *Rahman*, the preliminary approval
 28 motion and the Proposed Intervenor’s objections to the settlement are before this
 Court, which should be addressed in the normal course through the objection process
 afforded putative class members under Rule 23. Moreover, as explained *supra*, there
 was no collusion in reaching the settlement in this matter – which was well within
 the valuation range of VPPA class settlements.

At most, Proposed Intervenor suggests that the settlement – the terms of which they had not even reviewed at the time they filed their motion to intervene – might contain settlement provisions with which they disagree, but “[a]dequacy of representation does not turn on whether an existing party will litigate the case ‘in the exact manner’ that a putative intervenor would if they controlled the litigation.” *Id.* at *3 (citing *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009)).

Second, the Settlement is fair and reasonable on its face, as Plaintiff explains in detail in the Memorandum in Support of Preliminary Approval, *see* ECF 26. Proposed Intervenor largely ignore that analysis, which Defendant incorporates herein by reference. Indeed, the Settlement’s terms are comparatively more favorable in the aggregate than many VPPA settlements that have received final approval. *See* ECF 26 at 21-23. Moreover, Settlement’s terms are particularly fair to the Proposed Intervenor in light of the strength of Defendant’s defenses to *their* claims and against class certification. *See* ECF 26 at 13-21.

II. Proposed Intervenor Should Not Be Granted Permissive Intervention Pursuant to Rule 24(b).

This Court should also deny permissive intervention for similar reasons. Timeliness is also a threshold requirement under Rule 24(b), and the Ninth Circuit has explained that it is analyzed “more strictly” in that context than under Rule 24(a). *Wilson*, 131 F.3d at 1308. Because Proposed Intervenor’s motion is untimely, *see supra* 3-5, the Court need not go further in order to deny it. But in any case, permissive intervention is further inappropriate here because it would “unduly delay or prejudice adjudication of the original parties’ rights” for the reasons explained above. *See Cody v. SoulCycle, Inc.*, No. CV 15-06457-MWF (JEMx), 2017 WL 8811114, at *5 (C.D. Cal. Sept. 20, 2017) (denying permissive intervention where the request is “not timely and risks compromising or postponing final settlement”). Notably, upon learning that a class settlement had been reached and before even

1 inquiring of the terms of the settlement, Proposed Intervenor’s counsel stated that he
2 would “file appeal after appeal,” “tie up these cases for years,” and drive up defense
3 costs. **Ex. A**, Decl. of Bonnie DelGobbo ¶10. Permitting intervention by individuals
4 whose stated intention is to cause delay and pursue a vindictive vendetta is not in
5 anyone’s best interest – much less the best interest of the settlement class.

6 CONCLUSION

7 Proposed Intervenor’s have not carried their burden to intervene. Their
8 objections should be heard through the ordinary settlement class member objection
9 process specified in the settlement agreement, not by way of a belated and disruptive
10 attempt at intervention. The Court should deny Proposed Intervenor’s Motion to
11 Intervene.

12 Dated: November 12, 2024

BAKER & HOSTETLER LLP

13
14 By: /s/Bonnie DelGobbo

15 Bonnie DelGobbo

16 *Attorneys for Defendant*
17 DIRECTTOU, LLC
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